United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-1291

To be argued by
DAVID A. CUTNER

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1291

UNITED STATES OF AMERICA,
Appellee,

—v.—

JEROME RAPOPORT,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

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Preliminary Statement

Jerome Rapoport appeals from a judgment of conviction entered on June 10, 1976, in the United States District Court for the Southern District of New York, following a nine-day trial before the Honorable Charles L. Brieant, Jr., United States District Judge, and a jury.

Indictment S. 75 Cr. 1246 was filed on December 23, 1975 in nine counts. Counts One, Two, Four and Six charged Jerome Rapport with making false loan applications to federally insured banks, in violation of Title 18, United States Code, Section 1014. Counts Three, Five and Seven charged Rapoport with making false loan applications to the Small Business Administration (hereinafter "SBA"), in violation of Title 18, United States Code, Section 10001. Counts Eight and

Nine charged Rapoport with false swearing under oath before a trial jury, in violation of Title 18, United States Code, Section 1623.

Trial commenced on April 12, 1976 and concluded on April 26, 1976, when the jury returned a verdict of guilty on Counts One, Two, Three, Six, Seven and Nine. The jury did not consider Counts Four, Five, and Eight, which were dismissed by the Court at the close of the Government's direct case.*

On June 10, 1976, Judge Brieant sentenced Rapoport to imprisonment for two years on each of Counts One, Two, Three, Six and Seven, to be served concurrently, and to imprisonment for one year on Count Nine, to be served consecutively to the other counts.

Statement of Facts

A. Synopsis of the Case

Jerome Rapoport was a lawyer and former "attorney-advisor" at the SBA who had a reputation as a "finder" of SBA bank guaranteed loans.** The Government's case

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* Rapoport was named as a defendant in two earlier indictments (74 Cr. 1141 and 75 Cr. 609) which contained charges relating solely to the loan transaction reflected in Count One of the instant indictment. Rapoport was tried on these prior indictments in May and October 1975, respectively. In each case, the jury was unable to reach a verdict. and a mistrial was declared.

** A part of SBA's program is to guarantee repayment of 90% of the amount borrowed by small businesses from commercial banks. In order to obtain an "SBA bank guaranteed loan," the borrower must first submit an SBA application (Form 4) to his bank. If, in the bank's view, the loan qualifies for an SBA guarantee, the application is submitted to the SBA for approval. The SBA may then issue its guarantee to the bank on a loan not exceeding $388,000.

focussed on four such loan transactions in which the borrowers—completely unrelated and unknown to each other —retained Rapoport to obtain their loans. Each borrower was desperate for financing and had exhausted all alternative sources of money before coming to Rapoport, who demanded, at a minimum, a contingent fee of ten per cent of the loan proceeds. The loans in question ranged from $150,000 to $388,000.

As Rapoport well knew, however, the SBA would not process a loan application where the borrower proposed to pay such a fee, and the application form specifically called for disclosure of compensation paid for "services of any nature whatever" in connection with the loan. Accordingly, to avoid problems with his clients' loan applications and thereby to preserve his own illegal fees, Rapoport instructed his clients to omit his name and fee from the applications submitted to the banks and to the SBA.

Rapoport testified in his own defense and admitted that he had been retained by each of the borrowers and had received substantial fees (ranging from $15,000 to $39,050) from them out of the loan proceeds He maintained, however, that these fees were not for services rendered in connection with the loans, but rather were advance payments for unspecified consulting services to be rendered at unspecified times in the future, or at least this was *his* good faith understanding of the agreements. Thus, it was Rapoport's position that calling these payments "consulting fees" avoided the necessity of disclosing them.

During his earlier October 1975 trial, Rapoport made a similar defense but denied, on cross-examination, receiving approximately $31,600 in currency from a company called American Medical Products. This testimony,

and Rapoport's contention that he was a consultant to American Medical Products, formed the basis for the two "false swearing" counts in the trial below.*

The evidence clearly showed that, with *de minimis* exceptions, Rapoport had never rendered consulting services to any of the borrowers. American Medical Products in particular had flatly rejected Rapoport's proposal that he become a "consultant" to the company.

B. The Government's Case

1. The Entre Nous Loan (Count One)

In July 1973, Allan Pollak formed a greeting card manufacturing business called Entre Nous Corp. By early 1974, the company desperately needed money in order to survive. Pollak tried to borrow from banks, finance companies and friends, but he had no success. (Tr. 391-92).

On March 21, 1974, Pollak and his assistant Gail Jowers were introduced to Rapoport, and both testified to this meeting. They told Rapoport that they had come to talk about an SBA loan. Rapoport said he was very familiar with SBA loans and had "secured many, many loans and . . . never missed." Rapoport also said that he charged ten percent of the loan, to be paid in cash the day Pollak received the loan proceeds. Pollak tried

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* Count Eight, concerning Rapoport's denial of receiving this cash, was dismissed by Judge Brieant at the close of the Government's direct case on the grounds that the questions were not sufficiently clear and that Rapoport's denial by "nodding negatively" would not sustain a conviction (Tr. 727-28), although *United States* v. *Bonacorsa*, 528 F.2d 1218 (2d Cir. 1976) might well have warranted submitting it to the jury. Following the dismissal of Count Eight, Rapoport admitted on his direct examination receiving these cash payments. (Tr. 791).

to negotiate the fee, but Rapoport replied that if Pollak wanted him to speed up the operation and take advantage of his track record and expertise, then Pollak would have to pay this fee. Pollak finally agreed to Rapoport's terms. Rapoport then told Pollak to follow his instructions in preparing the papers, and that his fee should be put down as a consultant's fee. Rapoport said "we'll call it a consultant's fee and you can contact me a few times a year for two years." (Tr. 397-99, 552-54).

Thereafter, over the next four months, Pollak had numerous conversations and meetings with Rapoport concerning the loan, whom to deal with at the bank, how to prepare the presentation to the bank and to the SBA and how to fill in the forms. In April 1974, with regard to Item 10 on the SBA application (GX 1), Rapoport specifically told Pollak, "If you put my name in here you are not going to get the loan," and instructed Pollak to enter the word "None." (Tr. 402-15, 418; GX 11). Item 10 called for:

> "The names of all attorneys, accountants, appraisers, agents, and all other parties . . . engaged by or on behalf of the applicant . . . for the purpose of rendering professional or other services of any nature whatever to the applicant, in connection with the preparation or presentation of this to Bank in which SBA may participate or any loan to applicant as a result of this application; and all fees or other charges or compensation *paid or to be paid* therefor or for any purpose in connection with this application or disbursement of the loan whether in money or other property of any kind whatever, by or for the account of the applicant, together with a description of such services rendered or to be rendered . . ." (GX 1) (emphasis in original).

At the end of April 1974, the application was submitted to Manufacturers Hanover Trust Company. Item 10 contained the entry "None."

On June 7, 1974, Pollak came of his own volition to the United States Attorney's Office, and thereafter cooperated with the Government by reporting on his dealings with Rapoport and tape-recording some of their conversations. On July 18, 1974, the day of the closing on Pollak's loan, Pollak met with Rapoport for a "preclosing." (Tr. 416-18, 426-35, 763). The tape recording of their discussion reflected the following:

> "Jerome Rapoport: This is a compensation agreement where they ask you if you paid anybody to get the loan, and naturally you haven't. Okay, I'm there only as your friend. I don't want to see anyone fucking me with this loan.
>
> Allan Pollak: Okay . . . you said what?
>
> Jerome Rapoport: I don't wanna be paid. I don't want anybody to re-surface this matter, preparation or helping you with this loan. I don't want to be classified in that category.
>
> * * * * *
>
> "I thought you just told me on the use of proceeds, now watch it, the use of proceeds to make sure, but . . . my opinion is. *I'll tell you what I would do, I would, that's what you're paying me for, my advice.* We'll do everything possible . . . close the loan and get the partial proceeds $75,000." (GX 12) (emphasis added).

Then, on July 19th, the day after Pollak had received a part of the proceeds of his $150,000 loan, Rapoport said to Pollak in a taped conversation:

> "I'll meet with you sometime Monday. You will give me two checks to hold.
>
> * * * * *

Listen, I won't put those checks through but at the same time I want you to be alert to one thing, *the $15,000 is my money*, it's not yours, just remember that, don't borrow it, *I earned it*, right?

* * * * *

You know what I am saying, in other words *that belongs to me*, not to you, am I right or wrong the way I look at it?

* * * * *

I am not putting them through, but *that 15 belongs to me not you.*" (GX 13) (emphasis supplied).

During their lengthy conversation that same day, Rapoport and Pollak discussed a variety of methods of concealing Rapoport's fee from the bank, including:

"Allan Pollak: You were talking about 3500 on the front end and you will have to contact me how you want me to give you the eleven.

Jerome Rapoport: I think I know basically what I'm going to do.

Allan Pollak: I'm not able to take a check out for eleven.

Jerome Rapoport: Absolutely not.

Allan Pollak: They will crawl all over me.

Jerome Rapoport: Absolutely not. I'll tell you what I'm thinking of doing.

Allan Pollak: Now when you said out of Chicago account, you are talking about when the money is transferred to Chicago.

Jerome Rapoport: Absolutely, good heavens, I am not looking to hurt you in any way.

Allan Pollak: I can't do anything with Manufacturers. You know I can take out so much money, put it in Chicago account.

Jerome Rapoport: I know. That's the first account they are gonna check to see if you put that money there and watch that use of proceeds. Be careful they are gonna go through everything. I'm thinking of this Allan see how you like this idea. I am thinking of having you buy a car . . . and getting the, taking it off as part of use of proceeds, machinery and equipment.

Allan Pollak: Right, right.

Jerome Rapoport: Folow me?

Allan Pollak: I'm buying three cars now. Why can't I buy four?

Jerome Rapoport: Exactly right.

Allan Pollak: And you'll sell it?

Jerome Rapoport: Right, the whole question is, on my car, it has to be a little different, because I don't want them to get a lien on it. . . What I may go in and do, I'll tell you how I thought about it, is, what you'll do, let's say I am going to get, I know what car I'm going to get Alan, a $12,000 car, a Porsche. What I'll do is, I'll make arrangements.

* * * * *

What I'm trying to do is try to release some monies out of that machinery and equipment account for us. "(GX 13).*

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* On cross-examination, Rapoport denied that he was trying to hide anything from the bank, and testified that it would be perfectly legal to purchase a Porsche automobile for himself in New York and charge it to machinery and equipment for Pollak's greeting card company located in Chicago. (Tr. 878).

2. The Electrical Precision Meter Loan (Counts Two and Three)

Gerald Stolar and Charles Bernstein, president and secretary-treasurer of Electrical Precision Meter respectively, and Harold Wapnick, an accountant, testified for the Government with respect to Counts Two and Three.

In January 1973, the financial condition of Electrical Precision Meter, a manufacturer of direct current meters, was very poor. The company had lost money in three preceding years of operation, and there was an urgent need for cash to operate the business. Attempts to raise money through factors, banks, and financial organizations had all failed. (Tr. 233, 276-77).

About this time, the company obtained an introduction to Rapoport. Stolar, Bernstein and Harry Liederman, another officer, then met with Rapoport in their plant in Brooklyn. The officers outlined the company's financial position and asked for Rapoport's assistance in obtaining a loan in the amount of $250,000 to $300,000. Rapoport said that he felt he could help the company get an SBA loan. (Tr. 234-37, 278).

About a week later, the same officers met again with Rapoport, who told them that, if reappraised, their tooling and equipment might constitute sufficient collateral for an SBA loan of up to $388,000. Rapoport also said that his fee would be 10% of the loan, if he were able to secure one. Stolar and Bernstein at first objected to the fee on the ground that it was "extortionate," but then said they would agree if the fee included consulting services for three years. A written consulting agreement was signed on February 7, 1973 (GX 7), but payment of the fee was contingent on the company obtaining the loan. (Tr. 237-45, 279-80).

In March 1973, Electrical Precision Meter submitted its application for an SBA guaranteed loan to First National City Bank. (GX 2). Before doing so, Stolar and Bernstein asked Rapoport whether his name should be entered under Item 10 of the application. Rapoport insisted that it was not necessary to do so. Wapnick, the accountant who had reviewed the papers with Rapoport, also questioned Rapoport about Item 10. Rapoport told Wapnick to enter Wapnick's name, but not Rapoport's name. In May 1973, the company received loan proceeds in the amount of $388,000 and paid Rapoport his fee of $39,050 the very next day. Between February 1973 and the date of trial below, the only consulting services rendered to Stolar and Bernstein by Rapoport apart from the loan were one or two telephone conversations. Rapoport conceded on cross-examination that he did no more than four or five hours work for them in total. There were several meetings, however, concerning the loan, and Rapoport worked on subordinations and other details concerning the loan. (Tr. 246-62, 281-88, 306-08).

3. The Smugglers Attic Loan (Count Six and Seven)

Sol Inspector and Harold Rosenbaum, president and vice-president/secretary respectively, of Smugglers' Attic, and Joseph Blonder, a CPA, testified for the Government with respect to Counts Six and Seven.

Smugglers' Attic was a chain of gift and novelty stores in the eastern United States. In early 1973, the company's loans were called by Banker's Trust Company, and it made exhaustive efforts to obtain alternative financing. All efforts failed until Blonder, the com-

pany's accountant, was introduced to Rapoport by an officer of the First Israel Bank & Trust Company.

Blonder met twice with Rapoport before introducing Rapoport to his clients, Inspector and Rosenbaum. During these preliminary meetings, Rapoport told Blonder that he could obtain SBA financing for the company in exchange for approximately $30,000 and/or some of the company's stock, to be paid after the loan closed. There was no discussion as to Rapoport becoming a consultant to the company, apart from the loan. (Tr. 87-89, 173-80).

In February or March 1973, Blonder introduced Rosenbaum and Inspector to Rapoport. Rapoport told them he could arrange a loan of $350,000 in two to three weeks, and that his fee would be 10% of the loan, contingent on the loan's approval. There was no discussion about any consulting services to be rendered apart from on the loan. Rapoport said he would earn his fee by securing SBA financing. (Tr. 87-90, 92-95, 181-84).

Thereafter Blonder obtained the application form (GX 4) from Rapoport and returned a pencil draft to him. On the latter occasion, the two men reviewed the draft. Blonder specifically raised the question of disclosing Rapoport's name under Item 10, but Rapoport replied that it was neither needed nor required. (Tr. 186-89).

Shortly before the closing, Rapoport instructed Blonder to have two checks prepared for delivery to him at the closing: one for $10,000 payable to Jerome Rapoport, and the other for $15,000 payable to Citizen's Realty and Development, a company owned by Rapoport. Rosenbaum prepared the checks pursuant to these instructions, and delivered them to Rapoport on the

sidewalk in front of the bank immediately after the closing in the presence of Inspector and Blonder.* Rapoport told them to write off the $10,000 check as a legal fee, and to put the $15,000 in their books as a consulting fee for consultation on new lease locations for Smugglers' Attic.

Rapoport did not at any time render legal services or consulting work of any kind to Smugglers' Attic. Indeed, the words "consulting" or "consulting fee" had never been mentioned by anyone prior to the meeting on the sidewalk after the closing. (Tr. 96-105, 142-48, 192-95; GX 6).

4. The American Medical Products Loan (Count Nine)

Joseph Raymond and Marshall Samarel, the then-chairman and treasurer, respectively, of American Medical Products, and Haskell Seymour, a CPA, testified as Government witnesses as to Count Nine.

In early 1974, American Medical Products, a manufacturer of kidney dialysis machines, was very badly in need of financing. After efforts to obtain money from several banks proved unsuccessful, Seymour went to his own bank, Manufacturers Hanover Trust Company, which indicated interest in making an SBA guaranteed loan. Seymour then called Rapoport and asked his assistance. Rapoport agreed but demanded 10% of the loan plus 10% of the stock of the company as a fee.

After checking with his client and several days of negotiation, Seymour agreed to a fee of $25,000 in cash

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* There were two additional checks payable to Blonder's accounting firm in the total amount of $8,500, which, according to Rosenbaum and Inspector, were to go to Rapoport. Blonder testified, however, that he kept this money.

plus 10% of the stock, to be paid upon the disbursement of the loan proceeds. During the negotiations, Rapoport suggested that he become a consultant to the company, but American Medical Products responded that it was not interested in associating with Rapoport beyond the loan. No consulting agreement existed at any time, nor did Rapoport ever render consulting services of any kind apart from the loan. (Tr. 586-95, 609, 636-42, 665-69, 672-74).

In early October 1974, the American Medical Products loan was disbursed in the amount of $385,000. Shortly before the closing, on Raymond's instructions, Seymour advised Rapoport that American Medical would not give Rapoport any stock but would throw in additional cash. Then, following the closing, in four separate payments, Rapoport received $31,600 in currency, in plain envelopes. Seymour delivered three of these payments in his office, and Raymond delivered the final, $11,000 payment at a country club. (Tr. 599-608, 641-44, 669-74).

At the October 1975 trial, on cross-examination, Rapoport had denied receiving the cash, and claimed that he had entered into a consulting agreement with the company.

C. The Defense Case

Rapoport testified in his own behalf and raised two closely-related defenses. First, he disputed the borrowers' versions of their respective agreements with him. According to Rapoport, he had been retained in each instance as a consultant and his fees were for future consulting services and not for anything done in connection with the loans. Second, he maintained in essence that there was at least a misunderstanding and

that his good faith recollection of the fee agreements was simply different from the borrowers.* (Tr. 756-57, 763-64, 771, 779, 791).

Rapoport also testified on direct examination that he did not "find" any of the banks or promote any of the loans to the banks or the SBA. (Tr. 757-61, 775, 776, 789). Finally, Rapoport specifically denied telling any of the borrowers not to disclose his name under Item 10 of the application. (Tr. 761-62, 773-74, 780-81, 794).

As to the "false swearing" charge, Rapoport testified on direct examination that he reached an agreement with Joseph Raymond, Chairman of American Medical Products, pursuant to which he would become a financial consultant to the company if they received financing, in exchange for 10% of the loan plus 10% of the company's stock. After the loan was disbursed, Rapoport received a fee of $25,000 in cash,** which was for future services, and which was reported on his income tax return. Rapoport testified that American Medical refused to give him an equity position in the company because they knew he was under investigation. (Tr. 791-94, 806).

On cross-examination, the falsity of this testimony became manifest. When asked whether or not American Medical told him at any time that they did not want his consulting services, Rapoport testified that, after he received his fee of (according to him) $25,000, they said

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* Defense counsel argued in summation that:

"The issue here is what Mr. Rapoport understood and believed, and whether or not he was acting in good faith. What his belief was, what his state of mind was, not what theirs was." (Tr. 1091).

** The Government's proof showed that Rapoport received $31,600, but Rapoport claimed that the accountant Seymour kept $6,600 of this amount.

they did not want his services because they knew he was under investigation, something they knew, according to his direct testimony, before they paid the fee. In addition, when questioned about paying his taxes on this fee, Rapoport quickly withdrew his direct testimony that his 1974 income tax return had been filed, and admitted that he had filed an application for an extension of time to file, in which he verified under penalties of perjury that the total tax he expected to owe for 1974 was "none." (Tr. 808-14; GX 20).*

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* Rapoport's testimony on cross-examination also provided a remarkable view of the operation of his mind and his method of operation. For example, examination on Rapoport's advice to Alan Pollak on how to satisfy the bank in connection with the Entre Nous loan elicited the following:

> "Q. And, as a matter of fact, you advised the Pollaks that they should get a lease from Fred Pollak, Mr. Pollak's father, isn't that so? A. As one alternative, yes.
>
> Q. Just a maildrop, isn't that so? A. It satisfies the requirements.
>
> Q. Just a maildrop, isn't that so? A. Yes, sir.
>
> Q. You weren't telling them that you had to actually open up an office in the area, isn't that so? A. I told them what the sufficiency of the regulations were.
>
> Q. You knew that the bank wanted an office in the area, not a maildrop, isn't that so? A. No personal knowledge I think at that time.
>
> * * * * *
>
> Q. Mr. Rapoport, did you tell the Pollaks on July 18: "You're asking me why bank policy. They don't make loans out of the trading area."? A. Yes, they like to feel that people are in the area. Banks do make loans out of the trading area, but generally speaking, it's better on small businesses if they are in the trading area.
>
> Q. So isn't it true that it is your understanding that the banks want the company to be in the area? A. Well——
>
> The Court: Stick with this particular bank and this particular customer, would you, please? Entre Nous.

[Footnote continued on following page]

Q. I am speaking of Manufacturers Hanover Trust Bank and Allan Pollak. A. It is true that they like people in the area, and a maildrop will satisfy that requirment.

Q. Your understanding is that all of the bank wants is a maildrop? A. I don't know the bank's understanding. They might like to have the whole family and everything there. That would certainly be, you know, more——

Q. What you are saying is that you could get it by if you just had a maildrop, isn't that the idea? A. I am saying it satisfies the requirments and I was giving my advice.

Q. Is that what you mean by advising your clients to tell the truth, Mr. Rapoport? A. I don't tell my clients to lie, sir.

Q. Is that what you mean by telling your clients to tell the truth? A. Explain what covers the regulation—is that your question? Is that what you mean in your question?

Q. Is telling your client that a maildrop will suffice, is that what you mean by telling the truth? A. There was no truth or non-truth about he statement. I told Mr. Pollak what would satisfy the requirement. That has nothing to do with the truth or no truth." (Tr. 862-64).

Similarly revealing was the cross-examination concerning Rapoport's contention that he had agreed to be paid his fee due from Entre Nous out of Pollak's salary. Rapoport testified about a conversation he had with Pollak subsequent to this alleged agreement, as follows:

"Q. Were you asked this question and did you give this answer:

'Q. Did you subsequently tell Mr. Pollak that he could write a check to his father, Fred Pollak, sign it Fred Pollak on the back, cash it, and give the money to you? A. I think I said something to that effect'? A. I am not denying it.

Q. You say that is perfectly legal? A. What's perfectly legal? What's wrong? Tell me what's the wrongful act, and I will tell you whether it is legal or not.

* * * * *

Q. You see nothing wrong in telling Mr. Pollak to make out a check to his father and telling him to forge his father's endorement on the back of the check? A. If

[Footnote continued on following page]

The defense also called three officers from the Manufacturers Hanover Trust Company who worked on the Entre Nous loan: Francis Delepine, Thomas Hague, and Augustus McCarthy. They corroborated Rapoport's testimony that he did not "find" the bank for Allan Pollak, and McCarthy testified that Rapoport had advised the bank not to make the loan.

On cross-examination, however, McCarthy contradicted Rapoport on several points. While Rapoport had

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the check was to be made out to his father for a specific purpose I see there is something definitely wrong for him to forge a check made out to his father, absolutely.

Q. But if the money is not supposed to go to his father, then it is okay to forge his father's endorsement on the check? A. No, that's not the question. The question is——

Q. What's correct? A. The question was to make a check a bearer instrument, and I was just using him as an example.

Q. The way you make a check a bearer instrument is to have someone forge the endorsement on the back of the check? A. That's incorrect, You can put XYZ and sign XYZ and you may not be XYZ.

The Court: What's the purpose of doing something like that?

The Witness: It's a question of making an instrument fully negotiable so payment isn't stopped If you have a bearer instrument——

The Court: You mean if it was made out to Mr. Pollak's father it would be impossible to stop payment?

The Witness: In a negotiation if I were to sell that instrument to a third party, that third party becomes a holder in due course and a maker of the check cannot put up any defenses, of—oh, fraud or usuary, or half a dozen other defenses, to that instrument. So it becomes a perfectly valid instrument to go and borrow on the holder in due course gets full value." (Tr. 903-06).

testified "It is not my business to be a finder on SBA loans" (Tr. 820), McCarthy testified "I was aware that he was involved in packaging loans for SBA guarantees and the lease guarantee program that the SBA has . . . the major part of what I saw Mr. Rapoport doing was finding financing." (Tr. 985). Similarly, while Rapoport testified on his direct examination that, shortly before the Entre Nous loan, McCarthy said he was "embarrassed" by a $41,000 fee Rapoport had taken from Timbercraft (another company which had received an SBA loan), and told Rapoport to take a $2,000 monthly retainer instead (Tr. 794-97, see also Tr. 847-49), McCarthy testified that he told Rapoport that Rapoport "would not be welcome [at the bank] unless he returned that fee" and that he had not advised Rapoport to take the monthly retainer. (Tr. 973-74).

D. The Government's Rebuttal Case

Horace DePodwin, the dean of the Rutgers Graduate School of Business and the head of an economic and financial consulting firm in New York City, testified that a wide variety of consulting firms were available to the small businessman, ranging from a free consulting program utilizing retired executives organized by the SBA, to major firms such as Arthur Andersen or McKenzie, which charge from $100 a day to $1,200 a day per consultant, depending on his reputation and expertise. (Tr. 995-1006).

ARGUMENT

Through a misleading presentation of the facts and the law, the defendant has worked very hard to convey to this Court the impression that the Government has pressed an extremely thin case against an innocent man.* To the contrary, the Government presented an overwhelming case to the jury—ten witnesses gave direct evidence that Rapoport was retained to obtain loans on four separate occasions and five of those witnesses testified that Rapoport instructed them to omit his name from the SBA application forms, so as to conceal illegal fees totalling more than $100,000. Far from having "leveraged its case" with "new false statement counts of questionable sufficiency," as Rapoport desperately claims (Br. at 3, 20), the Government, after additional investigation and development of new counts, was able fully and clearly to demonstrate Rapoport's pattern of conduct.

The jury, which returned the guilty verdicts after a scant few hours of deliberation, plainly had no difficulty

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* Despite their obvious lack of relevance and propriety, repeated references are made in Appellant's Brief to an alleged "reported vote of 9-3 in Rapoport's favor" (Br. at 3) "provided to the Assistant United States Attorney by jurors whom he chose to interview" (Br. at 28) after the October 1975 trial. Yet, no reliable evidence of the vote exists, either on or off the record. In addition, insofar as Rapoport purports to represent the Government's knowledge of the matter, his claims are false. The Assistant United States Attorney who represented the Government at the October 1975 trail heard one juror say to defense counsel (Mr. Lauer) that the standing of the jury had been 9 to 3 in Rapoport's favor, but then other jurors standing nearby disputed this figure, stating that it referred only to one count and that those voting for acquittal included several jurors who were in favor of conviction on the other count. Susequently, and on more than one occasion, the Assistant objected to statements by defense counsel, Mr. Fleming, that the vote was 9 to 3 in Rapoport's favor.

in detecting the false character of Rapoport's testimony, and in rejecting his defense completely.* Indeed, the trial judge's impression of the Government's case and his view of the seriousness of Rapoport's crimes is best shown by his imposition of a three year prison sentence.

POINT I

Rapoport's claims of misconduct are strained and exaggerated.

As his first claim of error, Rapoport has adopted the common tactic of attempting to focus the appellate court's attention on the prosecutor, nor the defendant, by making exaggerated and disingenuous claims of misconduct. He begins by seizing upon a brief phrase from the Government's rebuttal summation, uttered after a two-week trial, and gives it a strained construction, upon which he bases a vituperative attack on the Assistant who tried the case. He concludes by arguing that the prosecutor sought to misrepresent the record when he objected to certain arguments made during the defense summation. This final argument is an utter distortion of the record.

The rebuttal summation remarks of the prosecutor, claimed to be so highly prejudicial, were as follows:

> "Every defendant in this country is entitled to the effective assistance of counsel, but even the very best counsel money can buy can't disentangle this man——
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> * * * * *

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* The falsity of Rapoport's testimony at the trial below was frequently manifest without reference to the testimony of any other witness. (Tr. 808-14, 816, 830-31, 833-34, 839-40, 851-55, 862-64, 873-74, 878, 886, 904-06, 918-20.)

> You may find that nothing can pull Mr. Rapoport out of the hopeless tangle of lies he has woven for himself."

These remarks, which were clearly intended to focus on the defendant's entanglement in a series of falsehoods, *not* on his lawyer, were directed at the myriad of dissembling arguments launched by the defense * and properly suggested that the defendant was so hopelessly caught up in his own lies that no amount of argument could retrieve him. See *United States* v. *Greene*, 497 F.2d 1068, 1085 (7th Cir. 1974), *cert. denied*, 420 U.S. 909 (1975). In proper context, the phrase "the best counsel money can buy," was no more than a colloquial expression reflecting on the defendant's hopeless situation arising from his own criminal conduct.

Instead of addressing in context the remarks which were actually uttered, the defense chooses to recast them and argues that the remarks were an "insinuat[ion] that Rapoport's money could buy justice" and an attempt "to establish the 'mouthpiece' image." (Br. at 10-11).** The remarks were intended to be, and were, nothing of the sort.

To the extent there was any impropriety in the prosecutor's actual remarks—and we readily concede that in

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* Tr. 1084-1129, especially at 1088, 1092-95, 1106, 1114, 1118, 1119, 1124-28.

** Indeed, the phrase under attack was no more an argument directed at counsel than was defense counsel's own reference to "our little immunized friends, the boys on the team" (Tr. 110) or to "Stolar, immunized, on their team" (Tr. 1101) or to "Mr. Samarel, playing on their ball team" (Tr. 1107). (See also Tr. 1086, 1). With no less strain on the English language than employed by defense counsel, these remarks might well be viewed as veiled allusions to subornation of perjury by the Government.

hindsight the Assistant's point could have been more crisply made without any allusion to counsel *—Rapoport plainly suffered no prejudice.**

First, Judge Brieant took care to issue a stern and immediate cautionary instruction to the jury, and defense counsel then turned the entire incident to his advantage by flippantly commenting, "I appreciate the compliment";

> "The Court: I will deny the motion. I think you have to remember attorneys have a duty to represent defendants to the best of their ability, and all defendants, whether they can afford to pay or not, are entitled to the best legal representation that can be obtained. I am going to instruct that the reference to money be stricken, and I am counting on your good faith, ladies and gentlemen, when I strike something out, that you will put it out of your minds. It is for that reason I am not granting a mistrial, which I could if I didn't have faith in your ability that you would do it.
>
> Mr. Fleming [defense counsel]: I appreciate the compliment." (Tr. 1130-31).

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* That counsel are paid for their work should have come as no surprise to the jury, especially since defense counsel stated in his opening: "Mr. Lauer and I are here to defend Mr. Rapoport against these charges. We are paid for our work. That is our business." (Tr. 21).

** In *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), the Supreme Court made it clear that an improper Government summation need not upset a conviction where the potential prejudice has been rendered negligible by the presence of mitigating factors, such as the brevity of the remarks in comparison with the length of the entire record, and the abundant independent evidence of the defendant's guilt. See also *United States* v. *Martin*, 525 F.2d 703, 707 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3358 (December 15, 1975); *United States* v. *Bivona*, 487 F.2d 443, 447 (2d Cir. 1973); *United States* v. *White*, 486 F.2d 204, 206-07 (2d Cir. 1973), *cert. denied*, 415 U.S. 980 (1974).

It is well settled that the issuance of such a curative instruction will ordinarily be enough to correct what might otherwise constitute a prejudicial error. *United States* v. *Mallah*, 503 F.2d 971, 979 (2d Cir. 1974), *cert. denied*, 420 U.S. 995 (1975); *United States* v. *LaFroscia*, 485 F.2d 457, 459 (2d Cir. 1973); *United States* v. *Miller*, 478 F.2d 1315, 1317-18 (2d Cir. 1973); *United States* v. *Pfingst*, 477 F.2d 177, 188 (2d Cir. 1973); *United States* v. *Sawyer*, 469 F.2d 450, 452-53 (2d Cir. 1972); *United States* v. *McKee*, 462 F.2d 275, 277 (2d Cir. 1972).* It would appear particularly appropriate to apply this principle when the defense has gained a tactical advantage as a result of the completed incident.

Second, here, as in *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 239 (1940), the remarks represented but a brief and relatively innocuous incident in a long trial. See also *United States* v. *White*, *supra*, 486 F.2d at 206.**

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* A mistrial is required only when the error is such that the jurors would be incapable of eliminating it from their minds. *United States* v. *Bynum*, 485 F.2d 490, 503 (2d Cir. 1973), *vacated on other grounds*, 417 U.S. 903 (1974); *United States* v. *Bergman*, 354 F.2d 931 (2d Cir. 1966); *United States* v. *Stromberg*, 268 F.2d 256, 269 (2d Cir.), *cert. denied*, 361 U.S. 863 (1959). The trial judge, who has the advantage of viewing the events first-hand, has broad discretion in determining the need for a mistrial. *United States* v. *Calabro*, 467 F.2d 973, 987 (2d Cir. 1972), *cert. denied*, 410 U.S. 926 (1973); *United States* v. *Marshall*, 458 F.2d 446, 451 (2d Cir. 1972); *United States* v. *Kompinski*, 373 F.2d 429, 432 (2d Cir. 1967).

Judge Brieant saw no need to declare a mistrial, and Rapoport's arguments do not begin to show an abuse of the trial judge's discretion.

** Indeed, in the *Socony-Vacuum* case, the prosecutor actually made the very argument which Rapoport strains so hard to show was made in the instant case:

> "A hundred lawyers employed—the very cream of the American Bar, the very best legal talent that these people

[Footnote continued on following page]

Moreover, the remarks were certainly overshadowed by the overwhelming proof of Rapoport's guilt. See *United States* v. *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 239; *United States* v. *White*, *supra*, 486 F.2d at 207.

Finally, the focus of the remark—on Rapoport as an incredible witness, as opposed to Rapoport as a wealthy defendant—further reduced or eliminated any prejudicial impact on the jury. *United States* v. *Somers*, 496 F.2d 723, 741 (3d Cir. 1974).

The second string to Rapoport's misconduct bow is the claim that the Assistant misrepresented evidence when he made an speaking objection * to defense counsel's summation. This contention is preposterous, since the prosecutor's objection was brought on by defense counsel's misrepresentations of the record.

In attempting to persuade the jury in summation that the testimony of the Government's witness Pollak should not be credited, defense counsel made the following argument:

> ". . . having testified before you that Rapoport told him to make a false statement in May, not only did he [Pollak] go into poor Mr. Wilson [the Assistant] and say that this was filed in accordance with law in June, but he went in the grand jury in November—" (Tr. 1119).

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can obtain—every one of them working night and day with suggestions as to how the red herring can be drawn across the clear cut issue in this case." 310 U.S. at 237.

Despite this direct, unequivocal comment on the defendants' wealth and ability to employ the very best lawyers—something that far exceeds the brief, colloquial expression employed here—the Supreme Court found that the prejudice had been minimized, and affirmed the conviction.

* Defense counsel was not outdone by the Government in making speaking objections. (See, e.g., Tr. 842, 866, 876, 889.)

This argument was grossly misleading as defense counsel either knew or should have known. During the trial, the Government had turned over to the defense 3500 material which included a transcript of Pollak's June 6, 1974 interview with Assistant United States Attorney Wilson. The transcript clearly showed that Pollak had told Mr. Wilson about Rapoport's 10% fee, but this conversation did not come into evidence at the trial, because it was an inadmissible prior consistent statement. But while the transcript was not offered, it was quite plain from the evidence that Pollak had revealed during the interview the existence of the arrangement with Rapoport because, immediately after the interview, an investigation of Rapoport was launched and Rapoport's phone conversations and meetings with Pollak were taped.

The trial record also clearly revealed that Pollak had testified to his dealings with Rapoport in the Grand Jury on November 1, 1974. The record reflects the following Grand Jury testimony by Pollak:

> "Q. Mr. Rapoport advised you, did he not, not to indicate to the SBA in any applications, or to the bank that he was assisting you in return for 10 per cent of the value of the loan, is that correct? A. Yes, he advised me not to do that.
>
> Q. In signing the various documents connected with this loan you did not disclose the fact that you were paying him 10 per cent? A. Yes, I did not disclose it.
>
> Q. So at his counseling and at his urging you made one or more false statements to both the bank and the SBA, is that correct? A. That's correct." (Tr. 533).

In the face of this record, it was clear that Pollak's trial testimony that the loan application was filed "in

accordance with law" referred to nothing more than his undisputed position that the application "gave a truthful picture of [his] business" (Tr. 531), and that defense counsel's argument that Pollak had not revealed the 10% fee arrangement to Mr. Wilson or the Grand Jury was misleading at best.

When the Assistant objected to defense counsel's argument by stating that "[i]t was very clear that he [Pollak] told Wilson that he was paying Rapoport the fee" (Tr. 1119), defense counsel responded that "[t]here is absolutely no evidence to that effect, and I would ask for a mistrial on that basis." (Tr. 1119-20). The trial court denied the motion and instructed the jury that "it is your recollection of the evidence that controls and not anything that I might say about what the evidence shows and certainly not anything that what any attorney says the evidence shows . . ." (Tr. 1120).

Defense counsel then promptly went on to compound his previous distorions by arguing:

> "And then he [Pollak] goes in the grand jury and takes the Fifth Amendment and then he goes in the grand jury and testifies *and he never says a thing about Rapoport in May of 1974 telling him to make a false statement in this document.*" (Tr. 1120-21) (emphasis supplied).

In view of Pollak's Grand Jury testimony, this statement was blatantly false and only aggravated the misimpression which defense counsel had earlier sought to create.

Against this factual background, Rapoport's claim that the prosecutor deliberately misrepresented the record when he stated in his objection that it was clear that Pollak told Mr. Wilson about the fee is simply incredible. First, the record did not support defense counsel's argu-

ment, and defense counsel was attempting to use a rule of evidence which prevented the admission of a prior consistent statement to argue a fact he knew was false. Second, even though Pollak's prior consistent statement was not part of the record, the fact that an investigation of Rapoport commenced immediately after the interview with Pollak provided abundant support for the prosecutor's inferential argument that Pollak *must have* revealed the fee arrangement to Mr. Wilson. See *United States* v. *Morell*, 524 F.2d 550, 557 (2d Cir. 1975); *United States* v. *Dibrizzi*, 393 F.2d 642, 646 (2d Cir. 1968).

POINT II

Rapoport was properly convicted of giving false testimony at a prior trial.

During his earlier trial in October 1975, Rapoport was cross-examined concerning his involvement with an SBA loan to American Medical Products. He testified that he was a consultant to the company, and denied that he had received cash payments in the approximate amount of $30,000. Count Eight, charging that his denial of receiving the cash was false, was dimissed by the Court.* The jury convicted him on Count Nine,

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* Judge Brieant dismissed this count because he did not believe Rapoport's response of "(nodding negatively.)" to the question "on several occasions [Mr. Seymour] gave you envelopes with cash in them on that loan?" was sufficient to sustain a conviction. The remainder of the questions were either, in the Judge's view, unclear, or Rapoport's testimony was admittedly literally true, *e.g.*, "Q. Isn't it a fact that Mr. Seymour who you say you know gave you $30,000 in cash on the American Medical Products Company SBA loan? Think hard. A. No, I don't think Mr. Seymour did." (Rapoport had received approximately $20,000 from Seymour, the CPA, and $11,000 from Raymond, the company's chairman).

however, for giving false testimony that he was a consultant to American Medical Products.

In attacking his conviction of "false swearing" at the earlier trial, Rapoport makes two arguments: (1) that "the false swearing counts obviously were designed to prejudice Rapoport's third trial defense on *all* counts," and (2) that "Rapoport's testimony [at the second trial] in connection with American Medical was irrelevant and therefore immaterial." (Br. at 15, 19) (emphasis in original). These claims are meritless.

A. The "prejudice" claims

Rapoport's first contention is totally frivolous. Although he now claims that the false swearing counts were "highly prejudicial," defense counsel, at the second trial, failed to make any objection whatsoever to the questioning which led to Rapoport's indictment for perjury. Moreover, at the very outset of the trial below, defense counsel declined Judge Brieant's invitation to move for severance of these counts.

As to Count Eight, Rapoport's prejudice claim is that, following Judge Brieant's dismissal of that count, "otherwise inadmissible evidence of cash payments remained in the record." (Br. at 14). To the contrary, this evidence of clandestine payments of $31,600 in cash was relevant and admissible as similar act proof, and for the purpose of attacking Rapoport's credibility under Rule 608 of the Federal Rules of Evidence, and for the purpose of showing that Rapoport was not a consultant, as discussed more fully *infra*.

Count Nine, according to Rapoport, "was even more pernicious" because it "struck directly at Rapoport's only defense to the false statement counts since it meant

that a grand jury had rejected this defense as false." (Br. at 14). Suffice it to say that (1) Rapoport did not move to sever this count, (2) Judge Brieant instructed the jury that an indictment is merely an accusation and not evidence of anything (Tr. 1144), and (3) no argument or allusion was made to the trial jury that the Grand Jury's action should be considered in any way.

B. The "materiality" claim

Rapoport argues, and we agree that: (1) materiality is an element which the Government must prove to sustain a conviction of "false swearing" under 18 U.S.C. § 1623, *United States* v. *Mancuso*, 485 F.2d 275, 280 (2d Cir. 1973); (2) the false swearing of which Rapoport was convicted must have been "material" to his second trial in October 1975; and (3) the standard for materiality "is whether or not the false testimony was capable of influencing the jury on the issue before it," *United States* v. *Gugliaro*, 501 F.2d 68, 71-72 (2d Cir. 1974), or whether or not truthful answers "would have been of sufficient probative importance . . . so that, as a minimum, further fruitful investigation would have occurred." *United States* v. *Freedman*, 445 F.2d 1220, 1227 (2d Cir. 1971).

We disagree, however, with Rapoport's arguments that the American Medical Products transaction was not material because it was not admissible at the second trial as similar act proof either (1) to show guilty knowledge or intent or (2) to show a common plan or design. On the contrary, the American Medical Products transaction was material for four reasons: as similar act proof to show Rapoport's guilty knowledge and intent; as similar act proof to show a common plan or

design; to attack the credibility of Rapoport as a witness; and to show that Rapoport was a finder and not a consultant.*

Despite Rapoport's claim that "no issue of knowledge or intent existed" (Br. at 16, 17, 19), there can be no question but that Rapoport's guilty knowledge and intent were clearly in issue at the October 1975 trial. The dual defense theory was that Rapoport either: (1) agreed to do consulting work unrelated to the loans, or (2) believed in good faith that he had entered into consulting agreements even if the borrowers thought otherwise. Indeed, Rapoport chooses to ignore defense counsel's argument in summation at the October 1975 trial that:

> "as Mr. Kenney [the Assistant United States Attorney] says, this case on trial comes down to Allan Pollak and Gail Jowers, what happened on March 21, 1974, at the apartment. What was the agreement?
>
> "*More significantly, what did he think was the agreement. . .*
>
> "Mr. Rapoport denies [Pollak's version]. He says that he told Allan Pollak specifically he would take no more money for assisting on the loan, that if Pollak wanted him to assist, look at the papers, et cetera, he would want to be hired as a consult-

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* It should be noted at the outset that, while Rapoport now maintains that the American Medical Products transaction had no relevance in the second trial, defense counsel did not object or move to strike the Assistant's questions during or after Rapoport's cross-examination at the October 1975 trial concerning American Medical or object to the Government's rebuttal proof that Rapoport had lied on cross-examination about that transaction. Nor did counsel object to the Assistant's arguments in summation that the jury could consider American Medical as similar act proof and as bearing on Rapoport's credibility. (Tr. 479, 900, 926, 933).

ant and his fee would be up to 10 per cent of any financing.

"That is the distinction Mr. Rapoport made to all of you as to what he says happened." (Tr. 943-44) (emphasis added).*

Equally telling is counsel's contradictory argument made in Point VI of his brief that:

"Since Rapoport's guilt or innocence turned on what he believed to his agreements, and since there was reason to suggest that the various applicants might well have understood what they wanted to understand rather then what in fact was said, the requested instruction on Rapoport's understanding and good faith was fair and should have been given." (Br. at 28.)**

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* Defense counsel's argument at the trial below was virtually identical:

"The issue here is what Mr. Rapoport understood and believed, and whether or not he was acting in good faith. What his belief was, what his state of mind was, not what theirs was." (Tr. 1091).

** Rapoport requested a charge in the second trial, as well as in the trial below, that he could not be convicted if the jury found that he believed in good faith that there was no obligation to disclose his fees on the loan applications. Rapoport's Supplemental Request No. 1 at the October 1975 trial specifically included the following language:

"Remember also that it is the prosecutor's burden to establish Mr. Rapoport's guilt beyond a reasonable doubt and in this case; as I have said previously, they must establish beyond a reasonable doubt that Mr. Rapoport acted in bad faith in connection with this fee arrangement with Mr. Pollak and in connection with the loan application filed with SBA.

In short, if Mr. Rapoport acted in the good faith belief that his consulting agreement did not have to be disclosed on the SBA loan application, you may not convict him of the offenses charged in the Indictment."

In any event, even if the defendant had conceded his guilty knowledge and intent—which he did not—the Government should not thereby be precluded from putting in proof on the conceded elements. It is the jury, not the defendant, that must be satisfied that the Government has proved each element beyond a reasonable doubt, and, accordingly, a defense confession should not prevent the Government from proving the defendant's guilt to the satisfaction of the jury.

It is settled that evidence of "other crimes, wrongs, or acts" is admissible if introduced for any purpose other than to show the defendant has a bad character or is a bad person. Fed. R. of Evid., Rule 404(b). See *United States* v. *Santiago*, 528 F.2d 1130, 1134 (2d Cir.), *cert. denied*, 44 U.S.L.W. 3659 (May 19, 1976); *United States* v. *Leonard*, 524 F.2d 1076 (2d Cir. 1975); *United States* v. *Eliano*, 522 F.2d 201 (2d Cir. 1975); *United States* v. *Papadakis*, 510 F.2d 287 (2d Cir.), *cert. denied*, 421 U.S. 950 (1975); *United States* v. *McCarthy*, 473 F.2d 300 (2d Cir. 1972); *United States* v. *Fried*, 464 F.2d 983 (2d Cir.), *cert. denied*, 407 U.S. 911 (1972); *United States* v. *Deaton*, 381 F.2d 114 (2d Cir. 1967). In ruling on the admissibility of this evidence, the District Court must weigh the probative value of the evidence against its potential prejudicial effect. This question is addressed to the sound discretion of the trial court, whose determination is entitled to great weight. *United States* v. *Leonard*, *supra*, 524 F.2d at 1080; *United States* v. *Brettholz*, 485 F.2d 483, 487-88 (2d Cir. 1973), *cert. denied*, 415 U.S. 976 (1974). Judge Metzner saw no reason to exclude the proof at the October, 1975 trial; nor did Judge Brieant, who admitted it in the trial below and charged the jury that they could consider it on the issue of guilty knowledge and intent.

Clearly, there was no abuse of the trial judge's broad discretion. The American Medical Products transaction bore directly on Rapoport's guilty knowledge and intent, and on his motive as well. Rapoport had agreed to obtain an SBA loan from American Medical Products for a fee of slightly less than 10% of the proceeds. After the company rejected his proposal that he be retained as a "consultant," Rapoport obtained payment by a different clandestine means: $81,600 in cash delivered in plain envelopes at an accountant's office and a country club. The tremendous size of the fees, the lack of any specific service to be rendered, and the clandestine manner of payment were all highly probative of Rapoport's state of mind in the similar Entre Nous transaction. See *United States* v. *Finance Committee to Re-Elect the President*, 507 F.2d 1194, 1197 (D.C. Cir. 1974).

The American Medical Products transactions was also relevant as evidence of a common scheme or plan. Although Rapoport argues that there was no "concurrence of common features" between the American Medical transaction and Entre Nous transaction because American Medical lacked a "similar sham consulting agreement," Rapoport conveniently ignores the Government's proof that he sought to be retained as a "consultant" and that the cash payments were made only after a "consulting" arrangement had been rejected by the company. In reality, the so-called "consulting agreement" provided Rapoport with a ready made "good faith" defense to any possible charges against him. Having been deprived of this cushion against detection and possible prosecution in the American Medical transaction, Rapoport settled instead on another clandestine means of covering up the illegal nature of the transaction: payment in cash.

It was also proper to question Rapoport on the American Medical Products transaction for the purpose of

attacking his credibility as a witness under Rule 608(b) of the Federal Rules of Evidence. Clearly, his involvement in such clandestine activity was probative of his truthfulness. Questions on cross-examination put for the purpose of impeaching the witness' credibility are a proper basis for a perjury charge. *United States* v. *Letchos*, 316 F.2d 481 (7th Cir.), *cert. denied*, 375 U.S. 824 (1963).

Finally, the questons concerning American Medical were relevant to show that Rapoport had business relationships with a number of companies, but never did any actual consulting. Rather, he was always retained in situations where the company was looking for financing. Had Rapoport testified truthfully that he was a finder for American Medical, not a consultant, this would have tended to rebut Rapoport's position that he was in the business of consulting. Indeed, the approach of the Government in the trial below was to rebut Rapoport's defense by showing that, while he claimed to be a consultant, he never did any consulting work.

POINT III

The evidence was overwhelming that Rapoport caused false loan applications to be filed. The guilt or innocence of the borrowers was irrelevant to his conviction under 18 U.S.C. §2(b).

Rapoport contends that his conviction on the false statement counts (Counts One, Two, Three, Six and Seven) must be reversed, because the proof of his guilt was insufficient. More specifically, Rapoport argues that, as the aiding and abetting subsection of 18 U.S.C. § 2 *

*18 U.S.C. § 2(a) provides: "whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

appears to require proof that the person who is aided or abetted is *guilty* of the crime, the "causing" subsection * requires proof that the person who is caused to commit the criminal act is *innocent*. Having been convicted under the "causing" subsection, § 2(b), Rapoport's claims that it was necessary for the Government to prove that the borrowers were innocent, and this, he says, the Government failed to do. This claim is frivolous.

While there is support in dictum in this Circuit for the proposition that a conviction for "aiding and abetting" under § 2(a) requires proof that the person aided and abetted is guilty of the substantive offense, see *United States* v. *Deutsch*, 451 F.2d 98, 118 (2d Cir. 1971), *cert. denied*, 404 U.S. 1019 (1972); *United States* v. *De La Motte*, 434 F.2d 289, 293 (2d Cir. 1970), *cert. denied*, 401 U.S. 921 (1971); *but see United States* v. *Bryan*, 483 F.2d 88, 92 (3d Cir. 1972) (*en banc*), *cited with approval in United States* v. *Kelner*, 534 F.2d 1020, 1023 (2d Cir. 1976), there is not the slightest suggestion in any of the cases cited by Rapoport that it is necessary under the "causing" subsection, § 2(b), to prove that the person caused to commit the act is innocent. *United States* v. *Kelner*, *supra*, 534 F.2d at 1022-23; *United States* v. *Berlin*, 472 F.2d 13, 15 (9th Cir. 1973); *United States* v. *Levine*, 457 F.2d 1187 (10th Cir. 1972); *United States* v. *King*, 364 F.2d 235 (5th Cir. 1966); *United States* v. *Grasso*, 356 F. Supp. 814, 819 (E.D. Pa.), *aff'd*, 485 F.2d 682 (3d Cir. 1973). Indeed, even a cursory reading of the cases reveals that the issue which the courts have wrestled with is whether it is *permissible* to convict under § 2(b) when the criminal

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* 18 U.S.C. § 2(b) provides: "whoever wilfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

act has been committed by an innocent party. The cases now make it clear that it is simply irrelevant under § 2(b) whether the person who is caused to commit the criminal act is also possessed of criminal intent. See, *e.g.*, *United States* v. *Kelner*, *supra*, 534 F.2d at 1023 ("it is *unnecessary* that the intermediary who commits the forbidden act have a criminal intent") (emphasis supplied); *United States* v. *Kelley*, 395 F.2d 727, 729 (2d Cir. 1968) ("A person *may* be held responsible as a principal under 18 U.S.C. § 2(b) for causing another to do an act which would not have been criminal if directly performed by that other person") (emphasis added). See also *United States* v. *Grasso*, *supra*, 356 F. Supp. at 819.

Aside from the dearth of support which the defendant's argument finds in the case law, the statute itself belies the defendant's claim. Section 2(b) provides that a person is guilty of causing a crime if the act "*directly performed by him* or another would an offense against the United States" (emphasis supplied). There is no question that Rapoport was possessed of criminal intent. Therefore, if the act had been "directly performed by him," it would have been an offense against the United States. In short, the very language of the statute makes the guilt or innocence of the person who is caused to commit the offense irrelevant; all that is essential to a § 2(b) conviction is that the defendant cause the commission of a criminal act and that the *defendant* possess the requisite criminal intent. See *United States* v. *Grasso*, *supra*, 356 F. Supp. at 819.

The illogic of the defendant's argument also merits brief mention. The position advanced by Rapoport boils down to the assertion that a defendant should be excused from conviction for causing a criminal act when

it cannot be proven beyond a reasonable doubt that the person whom he caused to commit the criminal act was innocent. If there is some rational basis for excusing the defendant when his agent is not proven by the Government to be innocent, we are unable to discern what it might be.

But even accepting Rapoport's specious theory, the convictions under Counts Two, Three, Six and Seven must be sustained. As to Counts Two and Three, Government witnesses Stolar and Bernstein testified that they did not know that the Electrical Precision Meter application was false. (Tr. 247, 250, 253, 284). As to Counts Six and Seven, Government witness Harold Rosenbaum testified that he never read the Smugglers Attic application. (Tr. 117, 123). Sol Inspector, the other signator of the Smuggl[illegible] Attic application, testified that he did not know what crime he had committed or why he had received immunity. (Tr. 150, 154). Thus, viewing the evidence in the light most favorable to the Government, *Glasser* v. *United States*, 315 U.S. 60, 80 (1942), there is ample evidence to support a finding that Rapoport caused *innocent* persons to submit the Electrical Precision Meter and Smugglers Attic applications.

POINT IV

Rapoport's claim that the loan applications were not false is legally and factually incorrect.

In Point Four of his brief, Rapoport argues that the loan applications merely "concealed" Rapoport's fee agreement and did not contain any "affirmative false statements" sufficient to sustain a conviction under 18 U.S.C.

§§ 1001 or 1014.* This argument has no basis in fact or in law.

Each SBA loan application, Form 4, contains the following:

> "9. Policy and Regulations Concerning Representatives And Their Fees . . .
>
> *SBA Regulations (Part 103, Sec. 103.13-5(c)) prohibit representatives from charging or proposing to charge any contingent fee* for any services performed in connection with an SBA loan unless the amount of such fee bears a necessary and reasonable relationship to the services actually performed; or to charge any fee which is deemed by SBA to have been necessary in connection with the application. The Regulations (Part 122, Sec. 122.19) also prohibit the payment of any bonus, brokerage fee or commission in connection with SBA loans.
>
> In line with these Regulations *SBA will not approve placement or finder's fees* for the use or attempted use or influence in obtaining or trying to obtain an SBA loan, *or fees based solely upon a percentage of the approved loan or any part thereof.*
>
> It is the responsibility of the applicant to set forth in the appropriate section of the application the names of *all* persons or firms engaged by or on behalf of the applicant. Applicants are required to advise the SBA Field Office in writing of the names and fees of any representatives engaged by

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* Rapoport appears to concede that this contention does not apply to Count One in that the Entre Nous application contained the word "None" under Item 10.

the applicant subsequent to the filing of the application.

10. Names of Attorneys, Accountants, And Other Parties. The names of *all* attorneys, accountants, appraisers, agents, and *all* other parties (whether individuals, partnerships, associations or corporations) engaged by or on behalf of the applicant (whether on a salary, retainer or fee basis and regardless of the amount of compensation) for the purpose of rendering professional or other services of any nature whatever to applicant, in connection with the preparation or presentation of this application to Bank in which SBA may participate or any loan to applicant as a result of this application; and *all fees* or other charges or compensation *paid or to be paid* therefor or for any purpose in connection with this application or disbursement of the loan whether in money or other property of any kind whatever, by or for the account of the applicant, together with a description of such services rendered or to be rendered, are as follows:" (emphasis added).

The box under Item 10 of each of the loan applications in issue, *i.e.*, Electrical Precision Meter and Smugglers' Attic, contains the name and fee of the company's accountant. Rapoport's name is nowhere mentioned.

In the face of these facts, Rapoport's claim that "no affirmative misrepresentations were made" is an exercise in semantics of the most frivolous sort. See *Robinson* v. *United States*, 345 F.2d 1007 (10th Cir.), *cert. denied*, 382 U.S. 839 (1965) and *United States* v *Goberman*, 329 F. Supp. 903 (M.D. Pa. 1971), *aff'd*, 458 F.2d 226 (3d Cir. 1972) (Section 1014 cases in which the failure fully to list liabilities was held to constitute a false statement). The application clearly calls for the disclosure

of "*all* [persons] engaged by or on behalf of the applicant" and "*all* fees . . . paid or to be paid," yet Rapoport's fee is not disclosed. Rapoport's contention is tantamount to a claim that an income tax return which reports only a portion of the taxpayer's income is not a false tax return.*

Moreover, even assuming (a) that a so-called "affirmative false statement" were required, and (b) that the disclosure of only the company's accountant under Item 10 were somehow viewed as not affirmatively false, then it should be noted that each application contained the following above the signature line:

> "12 CERTIFICATION, I hereby certify that:
>
> * * * * *
>
> (c) All information contained above and in exhibits attached hereto are *true and complete* to the best knowledge and belief of the applicant and

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* In income tax cases, the courts have summarily rejected claims that the omission of income from the return is not a "false statement." *E.g.*, in *Siravo* v. *United States*, 377 F.2d 469, 472 (1st Cir. 1967), the Court stated:

> "in our view it is unnecessary to resolve this dispute in semantics, for we hold that a return that omits material items necessary to the computation of income is not 'true and correct' within the meaning of section 7206. If an affirmative false statement be required, it is supplied by the taxpayer's declaration that the return is true and correct, when he knows it is not."

See also *United States* v. *Engle*, 458 F.2d 1017 (8th Cir.), *cert. denied*, 409 U.S. 875 (1972). *Cf. United States* v. *Mirelez*, 526 F.2d 915 (5th Cir.), *cert. denied*, 419 U.S. 1069 (1974); *United States* v. *Garcilaso de la Vega*, 489 F.2d 761 (2d Cir. 1974); *United States* v. *Tager*, 479 F.2d 120 (10th Cir. 1973), *cert. denied*, 414 U.S. 1162 (1974); *United States* v. *Williams*, 470 F.2d 915 (2d Cir. 1972).

> are submitted for the purpose of inducing SBA to grant a loan of to participate in a loan by a bank or other lending institution to applicant." (emphasis supplied).

In *United States* v. *Grasso*, *supra*, cited by Rapoport under Point Three of his brief but ignored for purposes of his argument on this point, the defendant was convicted under 18 U.S.C. §§ 2(b) and 1010 of causing others to submit mortgage applications to the FHA that were false in that they failed to disclose certain outstanding liabilities. The Court rejetced defendant's contention that these omissions were not "false statements" on the ground that the mortgagees signed certifications similar to the ones signed by the borrowers in the instant cases.

Finally, in promoting a result based on labels and formalistic reasoning, Rapoport would rob the judicial process of sense and reason. The evidence at trial was overwhelming that, with full knowledge of SBA regulations, Rapoport instructed his clients not to disclose his name in their loan applications. His actions were calculated to deceive the banks and the SBA, for the purpose of obtaining illegal fees exceeding $100,000. He had ample time to reflect and to abandon the fraud, but he did not. In such circumstances, whether the entries under Item 10 of the loan applications are termed "affirmative false statements," "concealments," or "half-truths," is simply a question of semantics.

POINT V

The Trial Court's instructions to the jury were proper.

The defendant raises a variety of objections to the court's charge. None of them has the slightest merit.

A. The charge on the defendant's testimony

Apparently in conducting a post-mortem of the trial record under miscrocopic examination, Rapoport has detected a minor omission from the typical charge on defendant's testimony, which he now for the first time views as prejudicial and as having as "imputed an evil motive to [his] second trial testimony." (Br. at 27).

The court charged the jury with respect to the defendant's testimony that:

> "While the law does not require the defendant in a criminal case to testify in his own behalf, or indeed to present any evidence, a defendant, if he wishes, may take the stand and testify.
>
> Now, the testimony of Mr. Jerome Rapoport is before you and you must determine how far it is credible. The deep personal interest which every defendant has in the result of his case should be considered in determining the credibility of his testimony. You are instructed that interest may create a motive to testify falsely. The greater the interest, the stronger is the temptation, and the interest of a defendant is of a character possessed by no other witness and, therefore, a matter which may affect the weight which should be given to that testimony.
>
> However, that is a matter entirely for you to determine, using your common sense and con-

sidering all of the evidence in this case." (Tr. 1155-56).

The omission from the requested charge which allegedly requires reversal is:

> "However, it by no means follows that simply because a person has a substantial interest in the result he is not capable of telling a straightforward or truthful story."

Defense counsel clearly did not believe that the charge when given was unduly prejudicial since no objection was made at trial. Had there been one, Judge Brieant could easily have corrected the apparent oversight. See *Estelle* v. *Williams*, 44 U.S.L.W. 4609 (U.S. May 3, 1976); *United States* v. *Inadunato*, 352 F.2d 276, 280 (2d Cir. 1965) (*en banc*), *cert. denied*, 382 U.S. 907 (1966).

Having failed to object to the charge below, the defendant can seek review only for plain error. Fed. R. Crim. P. 30, 52(b), *United States* v. *Pastore*, Dkt. No. 75-1428, slip op. 4307, 4313 (2d Cir. June 21, 1976); *United States* v. *Santiago*, *supra* at 1135. Viewing the instruction of defendant's testimony in the context of the entire charge, *United States* v. *Dozier*, 522 F.2d 224 (2d Cir. 1975); *United States* v. *Tyers*, 487 F.2d 828 (2d Cir. 1973), *cert. denied*, 416 U.S. 971 (1974); *United States* v. *Maher*, 363 F.2d 673 (2d Cir. 1966); *United States* v. *Sullivan*, 329 F.2d 755 (2d Cir.), *cert. denied*, 377 U.S. 1005 (1964), there was clearly no error at all, let alone "plain" error. Judge Brieant gave an extensive instruction on the credibility of witnesses in general, and noted specifically that "a witness who is interested in the outcome of the case is not necessarily unworthy of belief." (Tr. 1150). Moreover, the Judge gave the jury a careful warning on accomplice testimony, including:

> "Experience has shown that accomplices may be motivated to place the responsibilities upon others than themselves, and accordingly accomplice testimony should be closely examined, weighed with care, checked with the facts you find exist in the case against any other evidence which may corroborate the accomplice, and then give the testimony only such value and weight you deem proper under the circumstances of the case." (Tr. 1153-54).

Since virtually the entire Government's case rested on accomplice testimony, the defendant suffered no prejudice.

B. The American Medical Products proof

The Government proved at trial that Rapoport had agreed to obtain an SBA loan for American Medical Products for a fee of slightly less than 10% of the proceeds. After the company refused to go along with the usual "cover story" that he was to be a consultant, Rapoport obtained payment by a different clandestine means: $31,600 in cash delivered at an accountant's office and a country club in plain envelopes. While this proof was initially received on the false swearing counts, the court also instructed the jury that these clandestine payments could be considered on the other counts as well on the issue of the defendant's "guilty knowledge and intent." Rapoport claims that his knowledge and intent were not in issue, and therefore that this charge was improper.

For the reasons fully set forth in Point II, *supra*, this charge was completely proper. Rapoport's knowledge and intent were elements of the crimes charged, and the Government was not precluded from introducing

relevant proof on these elements, even if Rapoport were disputing only "the doing of the act in question." In any event, Rapoport quite clearly concedes his knowledge and intent only when it serves his purposes. See subpoint C, *infra*.

C. The so-called "good faith" charge

Having based his argument that the American Medical Products transaction was inadmissible as similar act proof on the contention that "no issue of knowledge or intent existed" (Br at 16), it is quite remarkable that Rapoport here claims as error the court's failure to charge that he could not be convicted if he believed in good faith that there was no obligation to disclose his fees on the loan applications.

But even putting to one side Rapoport's inconsistent arguments, such a charge was not required, nor was Rapoport prejudiced in any way by Judge Brieant's decision not to give it. The Judge properly charged on the elements of the crimes and included a thorough discussion of the necessity of finding that Rapoport acted "knowingly and wilfully" and with criminal intent. (Tr. 1167, 1171-75, 1182, 1184-85). Viewing the charge as a whole, there was no prejudice whatsoever. *United States* v. *Dozier*, *supra*; *United States* v. *Tyers*, *supra*.*

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* In support of hic claim that a good faith instruction should have been given Rapoport cites *United States* v. *Diogo*, 320 F.2d 898, 905-07 (2d Cir. 1963). Suffice it to say that the facts in *Diogo* are so far removed from the facts of this case that *Diogo* provides no support whatever for the defendant's claim.

D. The charge on Rapoport's testimony that "Nine people thought I was Innocent."

The last questions and answers on Rapoport's re-direct examination were:

> "Q. Did you testify in your defense in October at the second trial? A. Yes, sir.
>
> Q. Did they then indict you for things you said in your defense? A. Yes, sir, they did.
>
> Q. Were you convicted at that trial? A. Nine people thought I was innocent, sir." (Tr. 929)

Similarly, in his opening, defense counsel had claimed that "The government was unable to convict Mr. Rapoport of that charge, ergo a new indictment—" Tr. 22-23).*

In view of this admittedly improper testimony of Rapoport, Judge Brieant instructed the jury that:

> "I have told you previously that it is your sworn duty to decide this case solely on the evidence presented to you in this courtroom and to put out of your mind anything which the court has directed you to disregard or which has been stricken out.
>
> You have also been told that what may have happened in other proceedings involving Mr. Rapoport is to play no part in your deliberations on the charges before you. Unfortunately, you have been told in testimony that was uncalled

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* The Government objected to this statement, and the court cautioned the jury that they should not concern themselves with the prior trial.

for, and which I had stricken out, that a particular result allegedly occurred in a prior trial. This was unfortunate for several reasons.

First of all, the prior trial involved, with the exception of count 1, which is Entre Nous, different charges and different evidence, and thus most of the case which you are called upon to decide today is being presented to a jury for the first time.

Secondly, in cases of a jury deadlock there is no record of the vote, and an estimate of the vote is frequently based upon hearsay or misinformation or just plain wishful thinking or the practice some people have to tell other people what they think they want to hear.

I also told you earlier under our system of justice a jury is never asked to find a defendant innocent. Rather the burden is on the government to prove him guilty beyond a reasonable doubt as to any charge against him, and if they don't do so as to that charge to the satisfaction of all 12 jurors, then he may not be convicted of that charge. So when a jury fails to reach a verdict it means that the members of the jury could not reach a unanimous decision as to whether or not the defendant was proved guilty beyond a reasonable doubt of count 1. And when this happens the government is entitled to attempt to seek a unanimous verdict before a different jury, especially where additional charges may be involved.

Finally, I should add that the remark which I have stricken and which I just referred to represented an improper appeal to your sympathies and

> emotions, which have no place in the deliberation of the jury. This defendant and the government each deserve a fair trial at your hands, and you can provide that only if you put aside everything and decide this case only on the evidence that is properly before you or the lack of evidence following my instructions as to the law." (Tr. 1156-58).

Continuing to rely on the alleged "9-3 vote at the second trial"—which is irrelevant, triple hearsay, and false insofar as the Government's understanding is concerned *—Rapoport objects to the court's statement that "an estimate of the vote is frequently based upon hearsay or misinformation or just plain wishful thinking." This claim is preposterous.

Rapoport was a lawyer, and he could not have failed to recognize the impropriety of his testimony, especially since defense counsel's remark in the opening statement was the subject of a cautionary instruction. (Tr. 23-24). Without a strongly-worded charge, Rapoport's testimony might well have been extremely prejudicial to the Government. Under the circumstances, Judge Brieant's charge was entirely fair and proper.

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* As defense counsel well knows, the report of a 9-3 vote was disputed by several jurors, who said that several of the jurors who favored acquittal on one count favored conviction on the other count. See footnote on page 19, *supra*.

POINT VI

Rapoport's condemnation of the Government's conduct as to the Entre Nous loan is without any basis. Indeed, he proposes that the Government engage in misconduct of a truly pernicious nature.

For his final point in a brief which loudly trumpets governmental misconduct at the turn of every page, Rapoport makes the bizarre claim that the Government somehow participated in a crime, the commission of which was *admittedly* complete several weeks before the Government was even aware of the existence of Jerome Rapoport. He contends that the Government's purported misconduct—which concededly had nothing to do with the commission of his offenses—requires that the charges against him be dismissed.

What Rapoport finds so "unconscionable" is that the Government "did *not* tell the bank that the government believed an undisclosed 10% fee agreement existed in connection with the loan," and that the Government "did not stop the loan." (Br. at 30) (emphasis in original). Rapoport concedes, however, that "the alleged conspiracy and false statement offenses were complete" some three months prior to the time the Government, according to Rapoport, should have informed the bank of its "belief." Such circumstances clearly have nothing in common with the conduct condemned in *United States* v. *Archer*, 486 F.2d 670 (2d Cir. 1973), the only case cited by Rapoport, where the primary concern was with the manufacture by federal officers of federal jurisdiction for what was an essentially local crime.

So far from being "conduct unbecoming an enforcement agency" requiring that the Government be "disciplined," we submit that it would have been improper and improvident for the Government to follow the course proposed by Rapoport. It seems to us a pernicious use

of Government power to advise private persons of tentative "beliefs" developed by the Government during pending criminal investigations. In addition, such advice might well have subverted necessary evidence gathering, especially where, as here, the matter had not yet been presented to a Grand Jury. Finally, it should be noted that, whatver one's view of the conduct in issue, it is incontestable that Rapoport was not harmed by, nor did he have any interest in, the conduct. While the bank may well have had an interest in protecting its investment *—though the Government guaranteed repayment of 90% of the loan—Rapaport was not a "person aggrieved" by the Government's conduct in even the remotest sense. *Cf. Jones* v. *United States*, 362 U.S. 257 (1960).

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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United States Attorney for the Southern District of New York, Attorney for the United States of America.

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Assistant United States Attorneys, Of Counsel.

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*In any event, the bank was not misled since the facts were not in reality different from what was set forth in the application. Pollak had no intention of paying Rapoport the fee after he began cooperating with the Government and, indeed, stopped payment on the $3,500 check he gave to Rapoport. Moreover, despite his suspicion that Pollak was paying a fee to somebody, McCarthy, the bank officer, exercised his "independent judgment" in favor of disbursing the loan. (Tr. 975, 994).

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AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Daniel H. Fineman, being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 2nd day of September, 1976 he served a copy of the within brief by placing the same in a properly postpaid franked envelope addressed:

Curtis, Mallet-Prevost, Colt & Mosle, Esqs.
100 Wall Street
New York, N.Y. 10005

And deponent further says that he sealed the said envelope and placed the same in the mail box for mailing at One St. Andrew's Plaza, Borough of Manhattan, City of New York.

Daniel H. Fineman

Sworn to before me this

2d day of September, 1976

Alma Hanson

ALMA HANSON
NOTARY PUBLIC, State of New York
No. 24-6763450 Qualified in Kings Co.
Commission Expires March 30, 1978